In the High Court of Punjab and Haryana, Chandigarh

I.T.R. No. 3 of 1990

Date of Decision: 17.01.2007

The Commissioner of Income Tax, Patiala

…Applicant

Versus

Shri A.S. Aulakh, Ropar

…Respondent

CORAM: HON'BLE MR. JUSTICE M.M. KUMAR

HON'BLE MR. JUSTICE RAJESH BINDAL

PRESENT: Mr. S.K. Garg Narwana, Advocate,
for the Applicant-Revenue.

JUDGMENT

M.M. KUMAR, J.

On the application filed by the Revenue before the Income Tax Appellate Tribunal, Chandigarh Bench, Chandigarh (ITAT), being R.A. No. 432/Chandi/88 in I.T.A. No. 245/Chandi/87, in respect of the Assessment Year 1983-84, the ITAT was persuaded to refer the following question of law for opinion of this Court:-

"Whether, on the facts and in the circumstances of the case, the I.T.A.T. was right in law in bifurcating the

profit or gain arising from the sale of incomplete house in June, 1982, into long-term capital gain with reference to the acquisition of the plot and short term capital gain with reference to the construction of superstructure made on the plot when the asset sold was one i.e. incomplete house, and there was only one sale transaction?"

It would be necessary to make a brief reference of facts as emerge from the order of the Tribunal, where the only issue debated was that the capital gain computed by the Income Tax Officer (ITO) should have been treated as long term gains as contemplated by Section 54F of the Income Tax Act, 1961 (for brevity, 'the Act'). The assessee had sold a small plot with a small super-structure on it for a sum of Rs. 2,25,000/- during the Assessment Year 1983-84. He claimed the benefit of Section 54F of the Act. The assessee claimed that the plot had been purchased and the construction was started long before the sale in June, 1982. It was claimed that a sum of Rs. 1,00,000/- had been spent on construction up to the year 1978. The Assessing Officer, however, on the basis of information collected from the assessee held that the benefit of Section 54F of the Act was not available to him because the house building advance had been sanctioned in favour of the assessee in August, 1980 when he received the first instalment and the remaining two instalments were received later on. On that basis the Assessing Officer concluded that the assessee must have constructed the building in August, 1980 or thereafter. He also held that when a super-structure is raised on the

plot, it becomes entirely a different asset and the life of this asset cannot be linked with the acquisition of the plot and, therefore, a new asset had come into existence after August, 1980, which was sold in June, 1982. He concluded that the sale of the property in June, 1982 would result into short term capital gain.

On appeal, the Commissioner of Income Tax (Appeal) upheld the order of the Assessing Officer and the assessee approached the Tribunal.

The Tribunal recorded the findings that the assessee had purchased the land from Shakti Cooperative House Building Society, vide sale deed registered on 27.10.1970 although the Tribunal had also recorded that the sale was against shares of Daya Singh son of Jarnail Singh and the transfer was made effective from 1.6.1978. In respect of the date of construction, the Tribunal has noticed that the Municipal Corporation, Ludhiana, sent a notice to the assessee on 2.3.1977, pointing out that his house was not being constructed according to the approved site plans and, therefore, he had contravened Section 195A of the Municipal Act, 1911, which led to the prima facie conclusion that construction had started as early as 1977. In that regard some receipts were produced before the authorities acknowledging payment of some work executed by the mason in July, 1978. The Tribunal has noticed that the fact could not be disputed by the Revenue and that the date of acquisition of the property was to constitute the basis for deciding whether he would be liable to pay short term capital gain or long term capital gain. The

Tribunal held that the capital gains arising out of the assets created by the assessee during three years immediately preceding the sale should be considered to be short term capital gains while gains on the remaining assets were to be considered as long term capital gains. The order of the Tribunal reads as under:-

> "……what at best can be said for the department is that the capital gains arising out of the assets created by the assessee during the three years immediately preceding the sale could be considered to be short-term capital gains while gains on the remaining assets should be considered to be the long term capital gains. One thing to note in this behalf is that the intention of the framers of the Act was to tax the actual profits earned on the sale of the asset. It is a matter of common knowledge that due to the general rise in consumer price index in the last several years, there has been a phenomenal rise in the market price of plots at Ludhiana. In fact the rise in the price of property is more to the price of the land which is now in shortage. Of course, there is also rise in the cost of material but qua the building there is some corresponding decline also because of depreciation. At any rate, there would not be much rise in the price of material during the three years immediately preceding the sale because the total cost of construction has been estimated by the ITO at Rs. 50000/-. The ITO has

mainly relied upon the fact that a loan of Rs. 18000/- was sanctioned in August, 1980. Therefore, the construction must have been done by the assessee after 1980. It is difficult to give the exact date of construction but keeping in view the all over fact and circumstances, we would estimate that the assessee may have spent about half the amount i.e. Rs. 25000/- during the three years immediately preceding the sale. It is correct that the assessee received a loan of Rs. 40000/- from (for?) this construction in this period but it was explained before us that part of the loss was utilised from payment of outstanding bills. Profit in relation to what the assessee had spent during these three years should therefore be estimated taking into consideration the general rise in the consumer price index during and thereafter giving deduction for the estimated depreciation of the building. At best to that extent, the gains resulting to the assessee can be considered to be short term capital gains. All the balance profit earned by the assessee on the sale of the building should be considered to be a long term capital gain."

Mr. S.K. Garg, learned counsel for the Revenue submitted that there was no material effect on the Revenue, which may arise on account of the order passed by the Tribunal. The aforementioned position has to be accepted by the Revenue because

the capital gains becoming available to the assessee for the preceding three years the sale of the incomplete house have been considered to be short term capital gains and all the balance profit earned by him on the sale of the building is to be considered as a long term capital gain. Even otherwise, we find that the Tribunal has taken a balanced view by bifurcating the profit or gain arising out of the sale of incomplete house in June, 1982 into long term capital gain by keeping in view the date of acquisition of the plot and short term capital gain by keeping in view the construction of super-structure made on the plot. Therefore, we find that no question of law would arise, especially when the Revenue has virtually conceded that the order of the Tribunal did not materially affect the Revenue.

Accordingly, the reference stands disposed of.

(M.M. KUMAR)
JUDGE

(RAJESH BINDAL)
JUDGE

January 17, 2007
Pkapoor